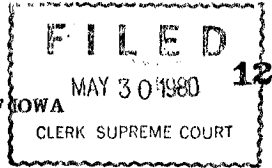


IN THE COURT OF APPEALS OF IOWA



DEBRA JO CARDAMON,)

Petitioner-Appellant,)

Filed May 30, 1980

vs.)

MICHAEL JOHN CARDAMON,)

Respondent-Appellee.)

0-93

63855

Appeal from Polk District Court - Anthony M. Critelli, Judge.

Mother appeals trial court's order transferring custody of minor son to father alleging trial court erred in finding 1) father had established a material and substantial change of circumstances since entry of the original decree, 2) father can minister more effectively to the child's needs, and 3) the child's best interests require a transfer of custody. AFFIRMED WITH MODIFICATION.

Diane L. Dornburg of Des Moines, Iowa, for petitioner-appellant.

Charles S. Lavorato of Roehrick & Mohr, Des Moines, Iowa, for respondent-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Petitioner-mother, Debra Jo Kurtz, appeals trial court's order transferring custody of the parties' minor son, Frank Anthony Cardamon, to respondent-father, Michael John Cardamon. She alleges trial court erred in finding 1) respondent established a material and substantial change of circumstances since entry of the original decree, 2) respondent can more effectively minister to the child's needs, and 3) the child's best interests require a transfer of custody. We affirm with modification.

The parties' eleven-month marriage was dissolved on September 11, 1969. Petitioner was awarded custody of the parties' infant son, Frank Anthony Cardamon, born April 19, 1969. On October 25, 1978, respondent filed his application to modify the custodial provisions of that decree. Hearing was held on June 19, 1979. Trial court granted the application on June 20, 1979, finding respondent had established a substantial change of circumstances requiring modification of the decree.

I. Scope of Review. Appellate review of a proceeding to modify custody provisions of a dissolution decree is *de novo*. Iowa R. App. P. 4; In re Marriage of Melton, 256 N.W.2d 200, 205 (Iowa 1977). The best interests of the child is our governing concern. Id. Where the custodial parent has properly provided for the child's social, moral, and educational needs, and the child has become attached to his or her environment, the court is not justified in transferring custody except for the most cogent reason. In re Marriage of Woodward, 228 N.W.2d 74, 76 (Iowa 1975). The parent seeking to acquire custody must show some superior claim based on his or her ability to minister, not equally, but more effectively, to the child's well being. Melton, 256 N.W.2d at 205. We apply these principles in light of the factors catalogued in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). In re Marriage of Dawkins, 285 N.W.2d 8, 9 (Iowa 1979); In re Marriage of McCreary, 276 N.W.2d 399, 400 (Iowa 1979).

II. Modification of Custody. Trial court based its determination primarily on the relative stability or instability of the parties' respective lifestyles. As is customary, we will give weight to trial court's fact findings and opportunity to observe the witnesses. In re Marriage of McDowell, 244 N.W.2d 238, 239 (Iowa 1976). In our review, however, we also will consider the characteristics of the child, the needs of the child, the relationship of the child to each parent, the child's sibling relationship, and the effects of continuing or disrupting an existing custodial status. Winter, 223 N.W.2d at 166-67.

After termination of her marriage to respondent, petitioner married Joseph Finn in July 1970. That marriage, which produced one son, Joseph Finn, Jr., was dissolved

after approximately three and one-half years. Custody of Joseph, Jr., was granted to petitioner and has remained with her. Petitioner married her third husband, Michael Kurtz, on July 18, 1978, after knowing him approximately three weeks. This marriage was dissolved by decree filed June 26, 1979.

Prior to her marriage to respondent, petitioner was hospitalized four weeks due to depression. During separation from respondent, petitioner re-entered the hospital for depression for approximately three weeks. On July 5, 1978, petitioner took a drug overdose in an attempt to end her life. When petitioner separated from her third husband in October 1978, she again was hospitalized due to depression. Despite these difficulties, however, petitioner always has taken measures to assure the children were cared for while she was hospitalized. At the time of hearing on this matter, petitioner was no longer engaged in counselling. She had obtained her high school G.E.D. and had a good prognosis.

In contrast, respondent has not remarried. He resides with his mother, uncle, and sister in the home where he grew up. Respondent is active in "Parents Without Partners." Although respondent appears to have stabilized in recent years, petitioner suggested respondent was very distraught when she divorced him and at one point threatened to kill himself.

Despite these deficiencies, both parties have developed good relationships with their son, Frank. He relates to respondent in a positive, comfortable manner. Respondent is well aware of Frank's problems. Petitioner is quiet and gentle with Frank. She involves herself in his activities, takes time to do things with Frank, and accompanies him on excursions. It appears Frank is comfortable in either party's home.

Respondent's principle complaints are directed towards petitioner's inability to meet Frank's needs. He has many criticisms about petitioner, and feels she is more interested in meeting her own needs than in providing a stable home and consistent parenting for Frank. It therefore is necessary to consider the needs of the child and each parent's ability to meet those needs.

A. Educational Needs. In regard to Frank's educational needs, respondent's complaints appear to be well founded. Although he is of normal intelligence, Frank is not doing satisfactory work in school. He has difficulty in concentrating and, as a result, needs improvement in all areas. Despite the fact he was sent to school in the morning in the company of petitioner's other son, Joe Finn, Frank was tardy thirteen times, Joe, once. Frank also missed twelve days of school. As a result, his teachers

recommended he repeat the fourth grade or be tutored through the summer. Petitioner has tried to work with Frank, but admits she has difficulty motivating him to do better. These problems may not be totally due to petitioner, however, since Joe is doing very well in school. Nevertheless, respondent seems more concerned with his son's educational needs and is highly desirous Frank receive a good education. Respondent also is more geographically stable, which would assure Frank of continuing his education in one school. We therefore conclude respondent can better meet Frank's educational needs.

B. Material Needs. Materially, we also agree respondent is better equipped to meet Frank's needs. He has been employed at the post office ten years. In contrast, petitioner's work record is sporadic, although she held a job with Sears for approximately three years. At the time of hearing she was unemployed. She and the boys were living on her unemployment benefits and the child support she received from each child's father. Although she is providing Frank and Joe with a well-furnished and spacious apartment, it is apparent respondent can offer more material advantages to Frank.

C. Emotional Needs. With regard to meeting Frank's emotional needs, it is not possible to conclude respondent has established a superior ability to minister. Frank is an emotionally constrictive, quiet, and withdrawn ten-year-old. He is described by his teachers and the social work investigators as always appearing sad. In early 1977, Frank was hospitalized for intestinal bleeding. Medical personnel suggested the problem may have been caused by emotional stress. Evidence in the record does not establish the source of this stress, although Frank has fears of losing one or both of his parents. The stress also may be a result of petitioner's unstable marital relationships and respondent's intense hostility towards his ex-wife. Respondent consistently criticizes petitioner in front of Frank. Respondent also has been inconsistent in exercising his visitation, changing it at his whim and often disappointing Frank.

For these problems, petitioner enrolled both Frank and herself in counselling. Respondent, however, has refused to assist petitioner in these efforts. He does not believe Frank's emotional problems will continue if the boy is placed in his custody. Undoubtedly, this negative attitude on respondent's part, his pressure on Frank to choose between him and petitioner, and petitioner's erratic marital encounters all have contributed to Frank's emotional difficulties. We note, however, respondent's inadequacies appear to be more easily rectified than petitioner's.

D. Moral Needs. We cannot say Frank will receive measurably better moral training from respondent than he has from petitioner. Respondent is from a well-established Catholic family. Petitioner, however, also has been taking Frank to church regularly. Although respondent suggested petitioner had flirtations with men in front of Frank, the allegations were not substantiated. In addition to these allegations, we also note respondent, in the past, worked briefly at a massage parlor.

E. Physical Needs. Respondent did establish he can more effectively meet Frank's physical health needs. For Frank's age, he has extensive dental problems. Evidence suggests some of the decay was due to petitioner's failure to monitor Frank's dental hygiene. Petitioner's inadequacy in this regard is supported further by Frank's suspension from school four days due to petitioner's failure to get Frank (and Joe) immunized after repeated warnings from school officials.

F. Social Needs. Frank's social needs also are a factor in our determination. While it is well settled we will not split the residence of siblings if possible, this presumption is not as strong when dealing with half-blood siblings. Although it has been established Frank is very close to Joe, Frank indicated to the social worker he wanted to live with his father. Moreover, liberal visitation by petitioner will permit a continuing relationship between the boys. In light of these considerations, we do not believe trial court's disposition is contrary to the general rule against splitting siblings.

While the effect of transferring Frank's custody to respondent means respondent's mother will be primarily responsible for Frank's daytime care during the week due to respondent's work schedule, we do not believe trial court's ruling means respondent's mother will be Frank's custodial parent. Respondent will be available to provide meaningful parenting in the morning and his days off. Respondent also has the possibility of daytime working hours.

Although petitioner has made substantial strides towards stability through counselling, her past difficulties suggest a strong probability she will have future problems with interpersonal relationships while she discovers her own needs and goals. She also is likely to experience future financial difficulties which have plagued her in the past and have contributed to her bouts with depression. In light of Frank's needs for a stable, predictable environment, and the parties' relative abilities to parent as demonstrated by the record, we conclude trial court properly transferred Frank's custody to respondent. We, however, remind respondent, as the new custodial parent, of

the necessity for immediate change in his attitude towards petitioner, especially with regard to his derisive comments to Frank concerning petitioner. We further remind respondent his parenting duties include a willingness to provide professional psychological counselling for Frank if his former problems recur.

III. Visitation. While we agree with trial court's transfer of custody to respondent, we do not agree with the visitation rights established by trial court. It is in Frank's best interests to have a full and complete relationship with his mother. Even though trial court stated petitioner should have liberal visitation with Frank, the court found it unwise to afford her visitation every weekend. Unless some positive detrimental effect is shown as a result of petitioner's visitations with Frank, we believe contact between them should be more frequent. Consequently, we order the following modification of petitioner's visitation rights.

Petitioner is to have visitation with Frank every other weekend from 5:00 p.m. Friday evening until 8:00 p.m. Sunday evening, commencing June 6, 1980. Petitioner further shall be allowed visitation one night during each week from 5:00 p.m. to 9:00 p.m. at her option, taking into account any regularly scheduled activities in which Frank is involved.

Petitioner shall have the right of visitation with Frank for a total of twenty-eight days during each and every summer. At her option, the visitation can be exercised in one continuous visit or divided into two fourteen-day or four seven-day periods. In order to exercise the summer visitation rights, petitioner shall notify respondent in writing of when she desires to exercise visitation no later than June 15, 1980, and no later than the 31st day of May each and every year thereafter.

In addition to the above ordered visitation, petitioner is to have the child on the following days from noon the previous day until noon on the day after the holiday, said holidays being: New Year's Day, Memorial Day, and Labor Day on odd-numbered years; Easter, Fourth of July, and Thanksgiving, on even-numbered years. She is to have visitation rights every Mother's Day weekend from 5:00 p.m. Friday until 8:00 p.m. Sunday. Beginning in 1981, and every other year thereafter, petitioner is to have the right of visitation on the child's birthday from 5:00 p.m. until 9:00 p.m. the day of his birthday. Commencing in 1981, and every other year thereafter, petitioner is to have visitation rights with the child from noon the day before Christmas until noon the day after Christmas. In addition to regular visitation, petitioner is to have rights of visitation in even-numbered years for five consecutive days of her choosing, from noon

the first day until noon the fifth day, during the child's Christmas vacation. Notice of the days of additional visitation is to be given on or before November 15th of each year. Said days are not to conflict with the rights of either parent relative to Christmas Eve, Christmas Day, and the day following Christmas.

The visitation provided for herein shall in no way be construed as a limitation on the child to see or visit petitioner, provided the parties mutually agree on additional visitation at other times. We further caution the parties' violation of custodial or visitation rights may result in further modification.

All other provisions of trial court's order modifying the decree of dissolution are affirmed.

Each party shall pay his or her own attorney fees. Costs of this appeal shall be divided equally between the parties.

AFFIRMED WITH MODIFICATION.

All judges concur except Oxberger, C.J., and Carter, J., who dissent.

OXBERGER, C.J. (dissenting)

I would leave custody of Frank with Debra. Admittedly, Frank has suffered emotional problems while he has been in Debra's custody. However, many of Frank's problems are directly attributable to Michael's efforts to undermine Debra's parenting. Michael's hostility toward Debra is clear and he has made no effort to shelter Frank from the adverse effects of the hostility. From the time custody was originally fixed, Michael has concentrated his actions toward divesting Debra of custody. Rather than rewarding Michael for those actions, and judicially condoning divisive efforts of non-custodial parents, we should be supportive of Debra's parenting and leave custody fixed. Michael has demonstrated neither superiority to administer to Frank's needs nor a most cogent reason for transferring custody. He has demonstrated a lack of cooperation toward counselling efforts on Frank's behalf that Debra initiated. Based on the record, I would leave custody with Debra. Accordingly, I dissent from the majority opinion.

Carter, J., joins this dissent.